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No. 90-1796

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Local Union No. 1937,
Petitioner,

vs.

THE LOWER LAKE DOCK COMPANY, NORFOLK SOUTHERN CORPORATION, NORFOLK AND WESTERN RAILWAY COMPANY AND LAMBERT'S POINT DOCKS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS NORFOLK SOUTHERN CORPORATION, NORFOLK AND WESTERN RAILWAY COMPANY AND LAMBERT'S POINT DOCKS, INC. IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner has identified the following as the questions presented for review:

> 1. Whether the Court of Appeals failed to give proper deference to the trial court's entry of a preliminary injunction prohibiting several railroads from violating the good faith duty imposed by Section 2 First of the Railway Labor Act, 45 U.S.C. §152 First, to make and maintain collective bargaining agreements, by reversing the grant thereof on the ground that the district court had entered erroneous findings of fact that the joint labor relations activities of the railroad [sic] constituted them as joint employers or alter egos?
>
> 2. Whether a rail carrier, which is terminated as the operator of a dock by another rail carrier while in the midst of collective bargaining negotiations, and the owning rail carrier, which is involved in and, by reason of a cost plus contract between them, concerned with the bargaining agreement and the ongoing negotiations, are under an obligation to continue bargaining with the dock employees' collective bargaining representative and to delay implementation of the termination until the "major disputes" procedures of the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, have been exhausted?

As set forth in this Brief, this case in fact presents no issues meriting Supreme Court review.

RULE 29.1 STATEMENT

Norfolk and Western Railway Company is a wholly-owned subsidiary of Norfolk Southern Railway Company, a wholly-owned subsidiary of Norfolk Southern Corporation, a publicly-owned corporation. Lambert's Point Docks, Inc. is a wholly-owned subsidiary of Virginia Holding Corporation, which is a wholly-owned subsidiary of Norfolk Southern Properties, Inc. which in turn is a wholly-owned subsidiary of Norfolk Southern Corporation.

The following majority-owned subsidiaries of Norfolk Southern Corporation have public stockholders:

High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
The North Carolina Midland Railroad Company
The South Western Rail Road Company
Southern Railway Company
Wabash Railroad Company
Yadkin Railroad

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This case presents no issue of national importance, no conflict among the circuits, and represents no departure from the holdings of any court or board. No reported case, in fact, has raised the same issues since the Railway Labor Act's passage in 1926. Because a decision of such little consequence simply does not merit Supreme Court review, respondents Norfolk Southern Corporation, Norfolk and Western Railway Company, and Lambert's Point Docks, Inc. respectfully request that the Petition for Writ of Certiorari be denied.

STATEMENT OF FACTS

The statement of facts contained in the Petition for Writ of Certiorari is substantially inaccurate and contains numerous misstatements and omissions of material facts. Pursuant to Rule 15.1, the correct statement of facts, based upon the evidence introduced before the district court, is as follows.

A. The Sandusky Coal Dock.

This dispute concerns a coal dock which is owned by and located in the City of Sandusky, Ohio. Respondent the Lower Lake Dock Company ("Lower Lake") operated the facilities at the dock as an independent contractor for different railroads since the turn of the century. In 1964, respondent Norfolk and Western Railway Company ("NW") acquired the facilities and contracted with Lower Lake to continue to operate them.

Lower Lake is a wholly-owned subsidiary of the M.A. Hanna Company ("M.A. Hanna"), a publicly held corporation whose shares are listed on the New York Stock Exchange. It has operated coal docks and coal facilities throughout the Great Lakes region. Neither Lower Lake nor M.A. Hanna has any corporate relationship to NW or to its parent, respondent Norfolk Southern Corporation ("NS"). NS is also a publicly held corporation whose shares are traded on the New York Stock Exchange.

B. Lower Lake Was NW's Independent Contractor.

From 1964 to 1989, Lower Lake was an independent contractor of NW. The agreement between Lower Lake and NW emphasized that it created an independent

contractor relationship. It required Lower Lake to provide its own work force and made Lower Lake responsible for all personnel matters:

> [I]t is expressly understood and agreed that the Contractor shall be and remain an original, private, and independent contractor hereunder and shall employ, pay from its own funds, and discharge all persons engaged in the performance of such work, *and all such persons shall be and remain the sole employees of the Contractor and subject to its exclusive authority, supervision, direction, and control.* (Appendix A at p. 8a) (emphasis added).

The contract also expressly prohibited NW from exercising control over the dock's operation. *None of these undisputed contract terms are even referenced in the Petition.*

Lower Lake operated the dock on a "cost-plus" basis. It charged all the dock's expenses to NW. These expenses included insurance, utilities, maintenance costs, wages of supervisory and hourly employees, and other operational expenses. Lower Lake also received a management fee based upon the amount of coal the dock handled.

D. NW Did Not Exercise Day-To-Day Control Over The Dock.

Contrary to the statements made in the Petition (at pp. 4, 9), there was no evidence, and no finding by either court below, that the railroad directed "daily job duties," that it was "intimately involved in the day-to-day operations," or that it "controlled the collective bargaining process." Rather, even the ILA conceded that the operation of the dock required a tremendous coordination of effort by the parties and many other entities.

The dock handled over fifty different types of coal, which were mined and delivered from three separate states. The correct type of coal had to be delivered to any one of many different customers, who used several different Great Lakes shipping lines. Because of the scheduling complexities, many of the arrangements were made by an independent entity in Cleveland known as the Coal and Ore Exchange.

Even with the assistance of the Coal and Ore Exchange, none of the parties could control the times of the arrivals of ships, which were affected by weather, currents, and delays at other docks. Likewise, weather conditions greatly influenced the speed with which cars could be unloaded. These external factors further forced the many entities involved to coordinate their activities.

NW and Lower Lake played distinct roles in the coal transloading process. NW employees delivered the coal cars to the dock. The cars were dumped by Lower Lake employees, who then returned them to NW for pick-up by NW employees. With the exception of a handful of isolated instances over the course of several years, each company's hourly employees worked solely at the direction of their own supervisors. The dock and rail yard were entirely separate and NW's closest office was literally miles away.

E. The ILA Recognized Lower Lake As Its Members' Employer.

The ILA long recognized Lower Lake, not NW, as the employer. The ILA and Lower Lake were the parties to the collective bargaining agreement, not NW. Collective bargaining negotiations took place between ILA and Lower Lake, not NW. Employee grievances

were submitted to Lower Lake and processed by Lower Lake. The ILA raised any unresolved grievances with representatives of Lower Lake's parent corporation, M.A. Hanna. The ILA served Section 6 notices[1] on Lower Lake and bargained with Lower Lake.

The ILA objected to any perceived intrusions by NW's employees at the dock. It was undisputed that the ILA's President complained to the Dock Superintendent (a Lower Lake supervisory employee) whenever an NW supervisor was accused of attempting to direct a Lower Lake employee. On one occasion, when an NW supervisor touched equipment at the invitation of a dock employee, the ILA filed suit in federal court. The ILA never directed grievances, Section 6 Notices, or bargaining requests to NW.

F. NW Considers A Change Of Contractors Because Of High Costs.

During the early 1980's, the amount of coal handled by the dock dropped significantly, but there was no corresponding reduction in expenses. Since those expenses were passed along to NW under the independent contractor agreement, NW was understandably concerned about the cost of the operation of the facility. It pressured Lower Lake to reduce all of its costs, including insurance, utilities, wages, management salaries, management fees, and other operational expenses.

On July 6, 1988, NW solicited bids from other companies to operate the coal dock. In response to these efforts, the ILA sought unsuccessfully to force Lower Lake to accept a "successorship" clause in its contract

[1] A Section 6 notice is a notice of intent to change the terms of the collective bargaining agreement. 45 U.S.C. §156.

and to force Lower Lake to convince NW to agree to it as well. NW first cancelled Lower Lake's contract on October 14, 1988, but later agreed to extend it for one year.

In 1989, NW awarded the contract for the management of the dock to a subsidiary of respondent Lambert's Point Docks, Inc. ("Lambert's Point"), which had successfully operated other docks for NW in Virginia. The labor for operation and maintenance of the dock was to be furnished by an independent contractor, CT Stevedoring, Inc. ("CT Stevedoring"). CT Stevedoring has no corporate relationship to any party in this case.

G. NW Terminates Its Contract With Lower Lake.

On September 14, 1989, NW advised Lower Lake that its management contract would be terminated. Lower Lake was opposed to the termination, but had no right under the agreement to prevent it. One month later, Lower Lake furnished its employees with a notice pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. Sections 2101 *et seq.*

Upon receipt of this notice, the ILA demanded separation pay and filed grievances under the collective bargaining agreement when Lower Lake refused. It demanded to meet with Lower Lake to bargain over the effects of the termination of Lower Lake's management over the facility. It settled a number of pending grievances it had with Lower Lake. The ILA served a Section 6 notice on Lower Lake for protective allowances, penalty pay, and for a successor clause in the agreement.

On December 15, 1989, NW advised Lower Lake that the dock would be operated by CT Stevedoring, and that the ILA members should submit applications for employment with that company. Notices were sent advising the ILA members that they could apply to CT Stevedoring. The ILA members, instead, entered into a pact *not* to apply for work with that company, and the ILA filed suit.

H. The Holdings Below.

The district court concluded that Lower Lake and Lambert's Point were "just alter egos" of NW and then enjoined not only the termination of the ILA's members, but also the termination of the commercial contract between NW and Lower Lake (Appendix B at pp. 11a, 14a). The court required no bond for either the labor-related or commercial aspects of its injunctive Order (*Id.* at pp. 15a, 19a).

On appeal to the Sixth Circuit, the ILA apparently recognized that the "alter ego" doctrine was inapplicable and contended instead that NW and Lower Lake were "joint employers." Because the defendants were "joint employers," the ILA argued, NW was bound to honor Lower Lake's contractual and statutory collective bargaining obligations. The Sixth Circuit, after reviewing the evidence and findings below, found that neither the alter ego nor joint employer theories were supported by the facts. It ultimately concluded that there was no basis for the awarding of injunctive relief and reversed the district court's holdings (Appendix A at pp. 9a, 10a, 927 F.2d at 904). On April 24, 1991, the Sixth Circuit denied the ILA's petition for rehearing and suggestion of rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT MERIT SUPREME COURT REVIEW.

Rule 10.1 of the Rules of the Supreme Court of the United States provides that review on writ of certiorari "will be granted only when there are special and important reasons therefor." No such special and important reasons exist in this case.

Contrary to the ILA's statements in the Petition, this case presents only the issue of whether a railroad may be required to assume the collective bargaining obligations of its lawfully terminated independent contractor, which had worked for it under a cost-plus contract. In stark contrast to the ILA's assertion (at p. 11) that the issue has been "plaguing railroad labor relations for years," this is the *only* case in which this issue has ever arisen under the Railway Labor Act, 45 U.S.C. Sections 151 *et seq.* ("RLA"). The ILA cites no contrary cases. The Sixth Circuit, in fact, found no reason to decide whether authority under the National Labor Relations Act, 29 U.S.C. Sections 151 *et esq.* ("NLRA"), should be transplanted to the RLA since it concluded that the ILA's evidence did not meet the NLRA standard in any event.

Further, there is no conflict in the circuits, and no other case which may be affected by the court's decision. There has been no departure whatsoever from the holdings of this Court, the United States Courts of Appeal or, for that matter, any court or board.

The Sixth Circuit's decision was completely consistent with and premised upon cases decided under the NLRA. The court, applying the same rules used by the other courts of appeal and by the National Labor

Relations Board ("NLRB"), found that the facts adduced at the hearing simply did not support any conclusion that the defendants were "alter egos" or "joint employers."

The ILA's claims are not of national importance. There have been no joint employer cases in the past under the RLA. There are no cases pending under the NLRA or RLA which raise the same or even similar issue. The case simply involved the straightforward application of well established principles to a situation in which there was no evidence to support the ILA's contentions of joint employer or alter ego status.

II. THE SIXTH CIRCUIT, APPLYING WELL-ESTABLISHED PRINCIPLES OF LAW, PROPERLY CONCLUDED THAT DEFENDANTS WERE NOT JOINT EMPLOYERS.

A. This Case Presents No Issue Of Contracting Out.

After assuming the existence of joint employer status, the ILA devotes fully half of its argument (pp. 13-17) to the proposition that somehow the Sixth Circuit held that a railroad could lawfully subcontract work handled by its employees in an effort to thwart the collective bargaining process. Nothing in either of the decisions below even arguably stands for that proposition.

The decisions below addressed whether NW became the employer of Lower Lake's employees by virtue of the cost-plus contract and the coordination of effort necessary to transload coal from rail lines onto ships. See Appendix A at pp. 5a, 6a, 9a, 10a; Appendix B at p. 18a. As the Sixth Circuit succinctly stated, "a necessary

predicate to the district court's order is its finding that N&W was an employer of plaintiff's members." (Appendix A at pp. 5a, 6a). No court in this case has held, and none of the parties have argued, that an employer under the RLA may contract out work being done by its unionized employees. This case simply does not present the issue the ILA claims it does.

B. The Sixth Circuit Expressly Applied The Standard Which The ILA Argues It Should Have.

The ILA next contends (at pp. 17-21) that the Sixth Circuit somehow failed to afford the district court's findings the proper deference. It even argues, without any citation to the Sixth Circuit's opinion whatsoever, that the court engaged in *de novo* review of the trial court's findings (Petition at pp. 2, 6). These descriptions, however, misstate the Sixth Circuit's holding.

The Sixth Circuit did not engage in *de novo* review, but, as it stated *twice*, concluded that the district court's conclusion of alter ego or joint employer status was "clearly erroneous" (Appendix A at p. 9a). That standard, as the ILA concedes (at p. 18), was the proper standard of review.

The Sixth Circuit relied solidly upon the undisputed evidence adduced at the hearing and the district court's findings of fact. It did not, as the ILA suggests (at p. 19), make "credibility determinations." Indeed, the court expressly repeated the district court's factual findings, only to conclude that those findings did not establish the elements necessary for the ILA to prevail (Appendix A at pp. 2a-5a, 7a-9a). This case presents no issue concerning the appropriate standard of review.

C. The Evidence, Including The Facts Found By The District Court, Did Not Establish Joint Employer Status.

Only one page of the Petition makes reference to what was, in fact, the issue raised in the opinion below. As the Sixth Circuit concluded, and the ILA now concedes, "[t]here are four factors which must be analyzed in determining whether two companies are joint employers: the interrelation of operations between the companies, common management, centralized control of labor relations, and common ownership." (Appendix A at p. 6a, *quoting Metropolitan Detroit Bricklayers District Council v. J.E. Hoetger & Co.*, 672 F.2d 580, 584 (6th Cir. 1982)).

The four-part test used by the Sixth Circuit has been uniformly applied under the joint employer doctrine. *See, e.g., Pulitzer Publishing Co. v. NLRB,* 618 F.2d 1275 (8th Cir.), *cert. denied,* 449 U.S. 875 (1980); *International House v. NLRB,* 676 F.2d 906 (2d Cir. 1982); *Chesapeake Foods, Inc.,* 287 NLRB No. 43 (1987). Examining these four factors, the Sixth Circuit found that the evidence did not support a legal finding that the defendants were joint employers.

Although there was some interrelation of operations between NW and Lower Lake, that alone was insufficient. The Sixth Circuit properly found, and the evidence adduced at the hearing demonstrated, that NW and Lower Lake were not "substantially interrelated beyond the extent necessary due to the performance of their basic contractual duties." (Appendix A at p. 7a). It has long been recognized that a cost-plus contract, by itself, does not establish a joint employer relationship. *See, e.g.,* Appendix A at p. 7a; *Pulitzer Publishing,* 618

F.2d at 1279 & n.4; *International House,* 676 F.2d at 915; *United States Steel Corp.,* 270 NLRB No. 206 (1984).

It was undisputed that Lower Lake and NW had *no* common managment. There was *no* common ownership. These two elements of the four-factor test were missing entirely.

Finally, there was no common control or day-to-day control over labor relations. The independent contractor agreement left all personnel matters in Lower Lake's hands. While NW expressed concern over the cost of the dock's operation, its concern was a natural consequence of its obligation to reimburse Lower Lake's expenses under the cost-plus contract. The fourth element was also lacking in this case and thus the joint employer doctrine could not be applied even if adopted under the RLA.

CONCLUSION

The Sixth Circuit applied an established rule of law to an unusual and infrequent fact pattern. As such, the case presents no conflict between or among the circuits, no conflict with the decisions of this Court, and no issue of such importance to warrant this Court's intervention.

For all of these reasons, the ILA's petition should be denied.

Respectfully submitted,

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